

1  
2  
3  
4  
5  
6  
7 **UNITED STATES DISTRICT COURT**  
8 **DISTRICT OF NEVADA**  
9

10 CINDY SILVAGNI,

11 Plaintiff(s),

12 vs.

13 WAL-MART STORES, INC.,

14 Defendant(s).

) Case No. 2:16-cv-00039-JCM-NJK  
)  
)

) ORDER

) (Docket No. 57)  
)  
)

15 Pending before the Court is Defendant's motion to exclude Plaintiff's expert (Dr. Babuk  
16 Ghuman) with respect to his supplemental report on Plaintiff's future need for injection therapy, or  
17 alternatively to allow Defendant to depose Dr. Ghuman and disclose a rebuttal expert opinion. Docket  
18 No. 57. Plaintiff filed a response in opposition, and Defendant filed a reply. Docket Nos. 58, 59. The  
19 Court finds the motion properly decided without a hearing. *See* Local Rule 78-1. For the reasons  
20 discussed below, the Court **DENIES** the motion to exclude Dr. Ghuman, but **GRANTS** the alternative  
21 motion to depose Dr. Ghuman and disclose a rebuttal expert.

22 **I. BACKGROUND**

23 Plaintiff alleges that she slipped on a gel-like substance in the bath aisle of one of Defendant  
24 Wal-Mart's stores. *See, e.g.*, Docket No. 31 at 2. Plaintiff filed suit in state court, alleging a cause of  
25 action for negligence. *Id.* Defendant removed the case to this Court on the basis of diversity  
26 jurisdiction. *See* Docket No. 1. The expert disclosure deadline in this case expired on June 23, 2016.  
27 *See* Docket No. 18 at 3. Discovery closed on October 6, 2016. Docket No. 28. No trial date has been  
28 set.

On May 24, 2016, Plaintiff disclosed the expert opinion of Dr. Ghuman opining that Plaintiff would likely require cervical injection therapy in the future addressing the C5-6 and C6-7 segments, and estimating the cost for that therapy. Docket No. 57-3. On June 10, 2016, Plaintiff became aware of a recommendation that she undergo cervical surgery. *See* Docket No. 57-4. On June 14, 2016, Plaintiff served Defendant with a disclosure of that surgery recommendation. *Id.* On July 26, 2016, Plaintiff underwent cervical fusion surgery with respect to the C5-6 and C6-7 levels. *See* Docket No. 57-1 at ¶ 10. On September 30, 2016, Plaintiff disclosed records related thereto. *Id.* On October 6, 2016, Plaintiff disclosed a supplemental report of Dr. Ghuman opining that the cervical fusion rendered the likely need for future injection therapy treatments for the C5-6 and C6-7 levels to be “minimal in nature.” Docket No. 57-6 at 10. Dr. Ghuman nonetheless opined that, having undergone C5 to C7 fusion, Plaintiff could be expected to experience pain that requires injections and other therapy at the C4-5 level. *Id.* Dr. Ghuman provided an estimation of costs for that anticipated future therapy. *Id.*

On July 31, 2017, Defendant filed a motion to exclude Dr. Ghuman’s supplemental report. Docket No. 57.

## **II. STANDARDS AND ANALYSIS**

A party must disclose the identity of any expert witness it intends to use at trial. Fed. R. Civ. P. 26(a)(2)(A). The party must also provide a written report of the expert. Fed. R. Civ. P. 26(a)(2)(B). Parties must disclose their experts at the times and in the sequence that the Court orders. Fed. R. Civ. P. 26(a)(2)(D). Parties also have a duty to supplement their disclosures. *See* Fed. R. Civ. P. 26(e).

With regard to expert reports, “the party’s duty to supplement extends to both information included in the report and to information given during the expert’s deposition.” Fed. R. Civ. P. 26(e)(2). “However, an expert’s duty to supplement under Rule 26(e) is not a right to supplement at will.” *Colony Ins. Co. v. Colorado Casualty Ins. Co.*, 2:12-cv-01727-APG-NJK, 2014 WL 12646048, at \*2 (D. Nev. May 28, 2014).

A party may not use a supplemental report to disclose information that should have been disclosed in the initial expert report, thereby circumventing the requirement for a timely and complete expert witness report. Rather, supplementation under the Rule means correcting inaccuracies, or filling the interstices of an incomplete report based on information that was not available at the time of the initial disclosure.

*Id.*

1 “The time for supplementation is not limited to the discovery period.” *Burger v. Excel*  
2 *Contractors, Inc.*, Case No. 2:12-cv-01634-APG-CWH, 2013 WL 5781724, \*3 (D. Nev. Oct. 25, 2013).  
3 Rule 26(e)(2) requires supplementation of expert reports to occur “by the time the party’s pretrial  
4 disclosures under Rule 26(a)(3) are due,” which is 30 days before trial unless otherwise ordered by the  
5 Court. *See Abila v. United States*, Case No. 2:09-cv-01345-KJD-LRL, 2011 U.S. Dist. Lexis. 42944,  
6 \*4 (D. Nev. Apr. 14, 2011). “Generally speaking, supplementation of an expert report is proper where  
7 it is based on new information obtained after the expert disclosure deadline and the supplemental report  
8 was served before the time for pretrial disclosures.” *Colony Insurance*, 2014 WL 12646048, at \*2  
9 (collecting cases). Nonetheless, “[s]upplementation must be provided ‘at appropriate intervals’ upon  
10 learning new information. To that end, the Court is mindful of the ‘gaping loophole’ which can result  
11 when parties abuse the liberal policy of Rule 26(e) with respect to the timing of supplemental reports.”  
12 *Id.* at \*2 n.4 (internal citations omitted). Courts may therefore exclude an expert report provided before  
13 the time for pretrial disclosures when the disclosing party engaged in sandbagging or other improper  
14 conduct. *See id.*

15 In this case, the Court finds disclosure of Dr. Ghuman’s supplemental report was timely. The  
16 supplemental report is based on a change of factual circumstances occurring with Plaintiff’s surgery on  
17 July 26, 2016. *See* Docket No. 57-6 at 10.<sup>1</sup> The supplemental report was served prior to the deadline  
18 for the Rule 26(a)(3) pretrial disclosures and, indeed, was served within the discovery period. *Compare*  
19 *id. with* Docket No. 28. Moreover, the Court does not find bad faith sandbagging or other circumstances  
20 evidencing misconduct. To the contrary, the timeline of events lends itself to a finding of a good faith  
21 effort to keep Defendant abreast of Plaintiff’s continuing treatment and a reasonably prompt production  
22 of a supplemental report. Courts have found in similar circumstances that striking a supplemental expert  
23 report was not appropriate. *See Colony Insurance*, 2014 WL 12646048, at \*2 (holding that supplemental  
24

---

25  
26 <sup>1</sup> As a threshold matter, the Court is unpersuaded by Defendant’s contention that Dr. Ghuman’s  
27 supplemental expert report was not a proper “supplement” because he should have opined initially on the  
28 possibility that Plaintiff would undergo surgery. *See* Docket No. 57 at 7-8. Plaintiff underwent surgery after  
Dr. Ghuman’s initial expert report, which altered the factual landscape, and it was proper for him to  
supplement his opinion to reflect the changed circumstances.

1 report provided three days prior to discovery cutoff was timely when based on new information learned  
2 one and three months earlier (citing *Dowling v. Arpaio*, 2011 WL 5592909, \*1-2 (D. Ariz. Nov. 17,  
3 2011) and *United States v. 14.3 Acres of Land*, 2008 WL 4079272, \*6, 9 (S.D. Cal. Aug. 29, 2008)).  
4 The Court similarly finds here that the disclosure of Dr. Ghuman's supplemental report was timely.<sup>2</sup>

5 In fairness to Defendant, however, the Court will allow it an opportunity to depose Dr. Ghuman  
6 and respond with its own rebuttal expert report. *See, e.g., Colony Insurance*, 2014 WL 12646048, at \*2.<sup>3</sup>  
7 That expert report shall be served within 30 days of this order and must be limited to new opinions  
8 provided in Dr. Ghuman's supplemental report. The parties shall meet-and-confer on a date to depose  
9 Dr. Ghuman.<sup>4</sup>

### 10 **III. CONCLUSION**

11 For the reasons discussed above, the Court **DENIES** the motion to exclude Dr. Ghuman, but  
12 **GRANTS** the alternative motion to depose Dr. Ghuman and disclose a rebuttal expert.

13 IT IS SO ORDERED.

14 DATED: October 30, 2017

15   
16 \_\_\_\_\_  
17 NANCY J. KOPPE  
18 United States Magistrate Judge  
19  
20

---

21 <sup>2</sup> Defendant's reply consists in significant part of attempts to undermine Dr. Ghuman's conclusion.  
22 *See, e.g.,* Docket No. 59 at 5-6. Not only is such argument improperly included for the first time in reply,  
23 *see, e.g., Bazuaye v. I.N.S.*, 79 F.3d 118, 120 (9th Cir. 1996), but Defendant has not sufficiently explained  
24 why its critique impacts the outcome of the pending motion rather than providing a potential basis for  
25 impeachment or to otherwise challenge the substance of Dr. Ghuman's opinion during future proceedings.

26 <sup>3</sup> Defendant seeks broader relief for the first time in reply, including a second independent medical  
27 examination of Plaintiff, another deposition of Plaintiff, and disclosure of a new affirmative expert. *See*  
28 Docket No. 59 at 3. These requests for relief are denied as waived. *See, e.g., Bazuaye*, 79 F.3d 120.

<sup>4</sup> The Court would have, of course, preferred that such additional discovery occur close to the  
discovery cutoff of October 6, 2016, but Defendant filed its motion ten months after the disputed  
supplemental expert disclosure.